

# *Rule of Thumb* and the Folklaw of the Husband's Stick

Henry Ansgar Kelly

There is probably no truth whatever in the legend that he was permitted to beat her with a stick no thicker than his thumb.

W. L. Prosser, 1971<sup>1</sup>

A husband may chastise his wife with a stick the size of his thumb. Coke.

*Mr. Justice Thumb in the Act of Flagellation*  
Cartoon, 1 February 1782

Murder, eh? It's law, you bitch! It's not bigger than my thumb!

*Judge Thumb; or, Patent Sticks for Family Correction: Warranted Lawful!*  
James Gillray, Cartoon, 27 November 1782<sup>2</sup>

In a previous intervention in this journal, I was concerned with a subject connected with my overt profession as a teacher of English, namely, the use and pronunciation of Latin phrases in English contexts.<sup>3</sup> This time I wish to deal with the abuse of an English phrase in legal circles. I hope that the account will prove educational not only in itself but also as an object lesson of how not to manhandle the language.

The venerable and innocuous expression *rule of thumb* has taken a beating in recent years. It has been given a phony origin as designating an allowable weapon for wife-beaters, and in consequence there has been an effort to

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1. William L. Prosser, *Handbook of the Law of Torts*, 4th ed., 136 (St. Paul, 1971).
2. For discussion of these cartoons see *infra* notes 39–43 and accompanying text.
3. *Lawyers' Latin: Loquenda ut vulgus?* 38 J. Legal Educ. 195 (1988). The present article also touches upon two other research interests of mine, namely legal mythology and the history of Roman civil law and medieval canon law. A recent exercise of the former interest is my account of the evolution of the "myth of election" (the notion that American citizens born with dual nationality are required to elect one citizenship upon attaining majority and to renounce the other). *Dual Nationality, the Myth of Election, and a Kinder, Gentler State Department*, 23 U. Miami Inter-Am. L. Rev. 421 (1991–92). In another study, I have attempted to demythologize the origins of our Fifth Amendment protections by showing that they are less indebted to Magna Carta provisions and common law precedents than to the due process provisions of inquisitorial procedure stipulated by canon law. *The Right to Remain Silent: Before and After Joan of Arc*, 68 Speculum 992 (1993).

Journal of Legal Education, Volume 44, Number 3 (September 1994)

boycott its traditional usage because of the supposedly sinister circumstances of its beginnings.<sup>4</sup> I propose first to look at genuinely documented uses of *rule of thumb*, and then study incidences of the false interpretation and try to find the likely path of its development. Next I discuss instances in which the thumb (or some related measure) has been used to describe switches. Finally, I examine some earlier allegations of allowable wife-chastisement in English law, Roman civil law, and canon law.

### Rule of Thumb: Straight Scoop and Red Herring

The first rule of thumb to apply when one hears of a sensational, unusual, or amusing etymology of a word or phrase is to harbor a deep suspicion about it. This should come easily to lawyers, but it doesn't. I should add that the same is true of most English professors, who share the general populace's gullibility in such matters. As an illustration of the need for caution against the fake etymologists, I note that almost all acronymic explanations of words that antedate the 1940s (the era of RADAR, SNAFU, WAC, etc.) are spurious, and so are many such explanations for later words.<sup>5</sup>

The second rule of thumb is: *Look it up in the dictionary!* This is a simple procedure that does not seem to have occurred to many persons recently writing on our featured expression.<sup>6</sup>

To look up a phrase like *rule of thumb*, the first place to go is the *OED*, the large *Oxford English Dictionary* (thirteen volumes in the original edition, twenty volumes in the recent second edition). There we find, under *rule of thumb* (a separate entry, some distance away from the main entry on *rule*), this defini-

4. For instance, an Associated Press article by Stephanie Schorow reports that a Harvard student was found politically incorrect by his classmates for using the expression "rule of thumb," which they said was based on "a 16th century law that limited to the thickness of a thumb the stick that could be used by men to beat their wives." Under Scrutiny, *The Outlook* (Santa Monica), May 14, 1991, at C1. (My letter of protest appears on June 4, 1991, at A10.) Cf. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 *Wis. L. Rev.* 107, 109 n.5:

Kathleen Lahey remarked after reading a first draft of this Article on the origins of the phrase "rule of thumb": the size of a rod with which a man could beat his wife without being charged with abusing her at common law. We decided to use the term, however, because the images of violence and coercion it evokes seem appropriate here. Husbands often use rules in this area to batter wives, although the span of these rules seems often to be a bit thicker than a thumb.

5. The fact that the false explanation of *posh* as "port out, starboard home" was first reported as early as 1935 shows that at least one pseudo-etymologist was thinking in such terms before World War II. *Anzac*, recorded in 1915, is a genuine early acronym (a word formed from the initial letters or groups of letters of the words in a name or phrase), as opposed to a mere "initialism," in which each of the letters of an abbreviation is sounded. *A.W.O.L.* is an initialism from World War I that became an acronym, *AWOL*, in World War II. The word *acronym* itself was first recorded in 1943. On these matters see the *Oxford English Dictionary*, 2d ed. (Oxford, 1989), s.v. A (*A.W.O.L.*), Acronym, *Anzac*, *posh*, and see the notes titled "Posh" in 52 *Mariner's Mirror* 89, 210 (1966) and 57 *Mariner's Mirror* 91 (1971).
6. Christina Hoff Sommers, in noting the *OED* entry, is an outstanding exception. *Who Stole Feminism? How Women Have Betrayed Women* 204 (New York, 1994). But the explanation she gives from a Women's Studies Network communication by a folklorist, Philip Hiscock, that it comes from woodworking, *id.* at 204-05, is supported by no evidence.

tion: "A method or procedure derived entirely from practice or experience, without any basis in scientific knowledge; a roughly practical method. Also, a particular stated rule that is based on practice or experience." The earliest citation comes from Sir William Hope's *The Compleat Fencing-Master*, second edition, 1692, page 157: "What he doth, he doth by rule of thumb, and not by art." The next citation is in James Kelly's *A Complete Collection of Scottish Proverbs* (1721): "No rule so good as rule of thumb, if it hit." None of the twenty-odd subsequent illustrative citations have anything to do with punishment, domestic or otherwise, and none of the entries have anything to do with thumbs.

So, how did the story get started that the phrase originated in the context of wife-beating? It was not made up out of whole cloth, as too frequently happens in such cases. Rather, I speculate, someone who noticed that the thumb was supposedly used as a criterion for switches allowable against wives jumped to the conclusion that this practice gave rise to the phrase. Now that we know that the earliest recorded use of the expression is to be found in a fencing manual, should we use similar logic and conclude that the original had something to do with fencing? This would hardly make sense, since Hope uses the phrase in a way that suggests familiar usage in the past. Furthermore, when we turn to *thumb* in the dictionary, we find that the thumb was commonly taken, especially in the cloth trade, to be the equivalent of an inch (one should note that "a thumb" in this sense was short for "a thumb's breadth," and did not refer to the length of the thumb's first joint). The same was true in earlier Latin and French use. In DuCange's medieval Latin dictionary we find, under the word *pollex* (Latin for thumb), that among the laws of Robert III of Scotland (1390–1406) is a provision that thirty-seven medium-sized thumbs constitute one *ulna*, or ell—that is, our yard plus an inch.

The earliest significant connection that I have found between *rule of thumb* and wife-beating is in the following account, written in 1977 by Terry Davidson:

One of the reasons nineteenth century British wives were dealt with so harshly by their husbands and by their legal system was the "rule of thumb." Included in the British Common Law was a section regulating wifebeating. The law was created as an example of compassionate reform when it modified the weapons a husband could legally use in "chastising" his wife. The old law had authorized a husband to "chastise his wife with any reasonable instrument." The new law stipulated that the reasonable instrument be only "a rod not thicker than his thumb." In other words, wifebeating was legal.<sup>7</sup>

Davidson is a journalist with no evidence of legal or historical training (she apparently thinks that the British common law has sections that one can look up), and yet her explanation has been cited in a number of articles in law journals as the sole authority not only for the existence of a thumb measure-

7. Wifebeating: A Recurring Phenomenon Throughout History, in *Battered Women: A Psychosociological Study of Domestic Violence*, ed. Maria Roy, 2, 18 (New York, 1977). Sommers cites Del Martin, *Battered Wives* 31 (Volcano, Cal., 1976), who says that the husband's-stick doctrine (as found in American cases discussed below) constituted "a rule of thumb, so to speak." Sommers, *supra* note 6, at 206–07. But Martin is being whimsical, and is not saying that the alleged doctrine was called "rule of thumb."

ment for wife-beating in England but also for the origin of the expression *rule of thumb*<sup>8</sup>—though it should be noted that she herself does not explicitly claim that the phrase itself originated in the alleged new law moderating wife-beating.

Sometimes no source is acknowledged for the rule. Thus, a recent writer first cites Blackstone on the “English common-law tradition” and then goes on to say: “The common law set a criterion for measuring moderate chastisement; the ‘rule of thumb’ stipulated that a husband could discipline his wife with any reasonable instrument, including a rod no thicker than his thumb.”<sup>9</sup> The same is true outside legal circles, as evidenced in a recent history of divorce in the West: “Lethal weapons were ruled out, and a rule developed to the effect that if a stick or rod were used, that it should be no thicker than a man’s thumb. (This is the origin of the term ‘rule of thumb.’)”<sup>10</sup> Even a denial can be taken as an affirmation: one writer, after referring to an 1824 Mississippi case (*Bradley v. State*, treated below), says: “In other states, the right of chastisement was referred to as the ‘Rule of Thumb,’ which allowed a husband to beat his wife as long as the stick was no thicker than his thumb,”<sup>11</sup> citing two authorities, William Prosser (1971) and Beirne Stedman (1917),<sup>12</sup> neither of whom uses the expression *rule of thumb*, and the first of whom, as we have seen in the epigraph to this article, debunks the thumb-measurement legend. Let us look at Prosser’s statement in context:

A husband or father, as the head of the household, was recognized by the early law as having authority to discipline the members of his family. He might administer to his wife “moderate correction,” and “restrain” her by “domestic chastisement” [citing Blackstone and Stedman], although there is probably no truth whatever in the legend that he was permitted to beat her with a stick no thicker than his thumb.<sup>13</sup>

8. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727, 740 n.52 (1988) (citing Davidson); Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 Mercer L. Rev. 545, 547–48 (1988) (citing Davidson and the 1824 Mississippi and 1868 North Carolina cases (*Bradley v. State* and *State v. Rhodes*, respectively), which I take up below); Kerry A. Shad, *State v. Norman: Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C. L. Rev. 1159, 1165 n.43 (1990) (citing Mather and Davidson via Mather); Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 Iowa L. Rev. 553, 555 n.17 (1991) (citing, before Davidson, Lenore E. Walker, *The Battered Woman* 12 (New York, 1979), who cites only Davidson); Hope Keating, *Battered Women in Florida: Will Justice Be Served?* 20 Fla. St. U. L. Rev. 679, 680–81 (1993) (citing Mather). Of these writers, Fineman, Schroeder, and Keating attribute the origin of ‘rule of thumb’ to the alleged wife-beating law.
9. Nan Oppenlander, *The Evolution of Law and Wife Abuse*, 3 Law & Pol’y Q. 382, 387 (1981). A similar undocumented account is given in *Under the Rule of Thumb: Battered Women and the Administration of Justice: A Report of the United States Commission on Civil Rights* 2 (Washington, 1982), cited by Sommers, *supra* note 6, at 207.
10. Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* 325 (Cambridge, England, 1988).
11. Pauline W. Gee, *Ensuring Police Protection for Battered Women: The Scott v. Hart Suit*, 8 Signs 554, 555 (1983).
12. *Right of Husband to Chastise Wife*, 3 Va. L. Reg. (n.s.) 241 (1917).
13. Prosser, *supra* note 1, at 136.

**American Measurements: Husband's Thumb, My Thumb, One's Thumb or Forefinger, Half a Man's Little Finger, Wife's Wedding Ring**

For the thumb legend Prosser cites, without comment, only *State v. Rhodes*,<sup>14</sup> which in fact is the only case on record in which a husband was let off because "His Honor was of opinion that the defendant had a right to whip his wife with a switch no larger than his thumb"; this was in the Superior Court of Wilkes, North Carolina, in 1867, Judge Little presiding.<sup>15</sup> But, as we will see, this notion was roundly repudiated by the state supreme court in the following year. In the original version of his handbook Prosser had written, referring to the same case, "It was said that not even the criminal law would interfere, if he beat her with a stick no thicker than his thumb."<sup>16</sup> As we have seen, Prosser later relegated this "saying" to the realm of legend.

Stedman in his 1917 article says, "By the old common law rule the husband had the right to inflict moderate personal chastisement on his wife [citing a dozen authorities], provided he used, as some of the old authorities stated it, a switch no larger than his thumb."<sup>17</sup> For the last part, he cites only *State v. Oliver*,<sup>18</sup> an 1874 North Carolina case, and *State v. Rhodes*, but he is in fact drawing on the language of the latter case and being cagey about it, performing a CYA operation. Let us listen to what Judge Reade has to say in *Rhodes*:

It is not true that boys have a right to fight; nor is it true that a husband has a right to whip his wife. And if he had, it is not easily seen how *the thumb* is the standard of size for the instrument which he may use, as some of the old authorities have said; and in deference to which was his Honor's charge. A light blow, or many light blows, with a stick larger than the thumb, might produce no injury; but a switch half the size might be so used as to produce death. The standard is the *effect produced*, and not the manner of producing it, or the instrument used.<sup>19</sup>

I might observe in passing, in support of Reade's observation, that the half-inch rattan stick used today in canings in Singapore, and often causing severe injury, falls well within the girth of the average man's thumb. I might also suggest, as a matter for further research, looking for statutes or rulings about the size of canes used in corporal punishment not only in various law books of the former British Empire, but also in regulatory manuals of schools where caning was practiced.<sup>20</sup>

14. 61 N.C. (Phil. Law) 453 (1868).

15. *Id.* at 454.

16. William L. Prosser, *Handbook of the Law of Torts*, 1st ed., 166 (St. Paul, 1941).

17. Stedman, *supra* note 12, at 241.

18. 70 N.C. 60 (1874).

19. *State v. Rhodes*, 61 N.C. (Phil. Law) at 459.

20. Joseph A. Mercurio deals with the latter subject, concentrating on a New Zealand high school (Christchurch Boys' High School) over a period from 1881 to the time of his writing. He does not cite a rule for the size of the cane, but indicates that its dimensions were traditional: "The instrument of corporal punishment considered in this study is the cane, a rattan or bamboo rod approximately three feet long and one-half inch in diameter." *Caning: Educational Rite and Tradition* 1 (Syracuse, 1972).

It is quite clear that Stedman himself did not find any other references to the thumb as a standard of marital punishment, but he believed that the judge had seen such references. I will admit here, by the way, that Stedman comes close to speaking of a rule of thumb (that is, one instance of applying a rule of thumb), and it would have been perfectly proper for him to have said so. But this would be far from saying or implying that this usage was the origin of the expression, and it would give no grounds for anyone else to come to such a conclusion.

I should note that Judge Reade has been badly misrepresented by reports of his decision. In one instance, he was able to make his own correction. In the case of *State v. Mabrey*,<sup>21</sup> heard in 1870, Reade noted that his words in *State v. Rhodes*, in the passage in which he opposed the standard of the husband's thumb, had been perverted in the lower court "to mean that in any case, no matter what weapon was used or from what motive or intent, unless permanent injury were inflicted, the Court would not interfere." Reade wrote, "We repudiate any such construction of the *State v. Rhodes*."<sup>22</sup> Reade was not able to repudiate the interpretation of William Draper Lewis in his 1897 edition of Blackstone: "[T]he Supreme Court, of North Carolina, declared in *State v. Rhodes* . . . that a husband has a right to whip his wife with 'a stick as large as his finger but not larger than his thumb.' This decision was in recognition of a barbarous custom which modern authorities condemn."<sup>23</sup> Another misrepresentation can be found in one of the rule-of-thumb articles cited above: "[T]he court did not punish the husband because he used a switch smaller than his thumb and because the court wanted to avoid interfering with the family relationship."<sup>24</sup> In fact, the court dismissed the case because it concluded that in this particular instance the injury inflicted was minor. Reade says, just before the passage I cited above:

It will be observed that the ground upon which we have put this decision, is not, that the husband has the *right* to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife, than where the wife whips the husband; and yet we would hardly be supposed to hold, that a wife has a *right* to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence. Two boys under fourteen years of age fight upon the play-ground, and yet the courts will take no notice of it, not for the reason that boys have the *right* to fight, but because the interests of society require that they should be left to the more appropriate discipline of the school-room and of home.<sup>25</sup>

21. 64 N.C. 592 (1870).

22. *Id.* at 593.

23. 1 William Blackstone, Commentaries on the Laws of England, ed. William Draper Lewis, 417 n.102 (Philadelphia, 1897).

24. Mather, *supra* note 8, at 548 n.17.

25. *State v. Rhodes*, 61 N.C. (Phil. Law) at 459. It is clear from Reade's explanation that the court would have made the same judgment if the wife had done the beating. One cannot conclude, therefore, that husbands were being allowed a special latitude in chastising their wives, except, of course, in the sense that husbands were much more prone to such misconduct than wives and would more readily benefit by the court's conclusion.

In the later case cited by Stedman, *State v. Oliver*, Oliver had been found guilty of assault and battery and fined \$10 for having given five licks to his wife with "two switches, which were about four feet long, with the branches on them, about half way, and some leaves. One of the switches was about half as large as a man's little finger, the other not so large." The verdict was upheld on appeal, with Judge Settle declaring:

We may assume that the old doctrine, that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the Courts have advanced from that barbarism until they have reached the position, that the husband has no right to chastise his wife, under any circumstances.<sup>26</sup>

We may take it from these two cases that there was a belief in North Carolina that husbands had a right to use a small switch on their wives. In Alabama, it seems that there was a different standard current in some circles. In *Fulgham v. State* (1871),<sup>27</sup> which involved a dispute between a husband and wife who were "high-tempered" emancipated slaves,<sup>28</sup> Justice Peters, speaking for the state supreme court, rejected the defense that "a husband may give his wife moderate correction in order to secure her obedience to his just commands,"<sup>29</sup> and noted that even Blackstone did not call it a law but only an "ancient privilege" favored by the "lower rank of the people."<sup>30</sup> Blackstone "quotes no decided case, and possibly none such could then be found, which supports the privilege referred to by him, as an universal law." There were, he admits, some offenses in Blackstone's time, such as witchcraft and sorcery, that were "crimes at common law, and most cruelly punished against the voice of both reason and religion."<sup>31</sup> He continues:

Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.<sup>32</sup>

The justice is being ironic here, of course, but we can safely assume that there was such a belief about the wedding ring—the wife's ring, since husbands wore none in those days—being the measure for a rod that could by custom be used against her.

26. *State v. Oliver*, 70 N.C. at 61.

27. 46 Ala. 143 (1871).

28. *Id.* at 144.

29. *Id.* at 145.

30. *Id.* at 145–46.

31. *Id.* at 146.

32. *Id.* at 146–47.

The only earlier case so far turned up referring to the use of one's thumb as a measurement in the exercise of domestic discipline comes in 1824 in Mississippi, in *Bradley v. State*.<sup>33</sup> Here Powhattan Ellis, speaking for the supreme court, addressed the question of whether a husband could be convicted of assault and battery upon his wife:

[A]n unlimited licence of this kind cannot be sanctioned, either upon principles of law or humanity. It is true, according to the old law, the husband might give his wife moderate correction, because he is answerable for her misbehaviour; hence it was thought reasonable, to intr[u]st him, with a power, necessary to restrain the indiscretions of one, for whose conduct he was to be made responsible. . . . Sir William Blackstone says, during the reign of Charles the first, this power was much doubted.—Notwithstanding the lower orders of people still claimed and exercised it as an inherent privilege, which could not be abandoned, without entrenching upon their rightful authority, known and acknowledged from the earliest periods of the common law, down to the present day. I believe it was in a case before Mr. Justice Raymond, when the same doctrine was recognised, with proper limitations and restrictions, well suited to the condition and feelings of those, who might think proper to use a whip or rattan, no bigger than my thumb, in order to inforce the salutary restraints of domestic discipline. I think his lordship might have narrowed down the rule in such a manner, as to restrain the exercise of the right, within the compass of great moderation, without producing a destruction of the principle itself. If the defendant now before us, could shew from the record in this case, he confined himself within reasonable bounds, when he thought proper to chastise his wife, we would deliberate long before an affirmance of the judgment.<sup>34</sup>

Ellis's train of thought is not entirely lucid here, but I construe him to be saying that, in his own opinion, those who exercised discipline upon their wives by using a whip the size of his thumb would be acting reasonably. He does not seem to be saying that any such specific criterion had been set by anyone else, whether in a judicial or a private setting.

In a later North Carolina case, *State v. Jones* (1886),<sup>35</sup> in which a father was charged with whipping his daughter with "a switch, or small limb, about the size of one's thumb or forefinger," no principle was claimed to be involved; it was simply a matter of description.<sup>36</sup>

### England and Mr. Justice Thumb

We find, then, that there was a tradition in North Carolina, supported in one case by a lower court, that a husband had a right to whip his wife with a switch smaller than his thumb; but no evidence has been cited by any of the sources treated so far that such a tradition existed in any of the other states or in England. I had almost concluded that there was nothing to be found when

33. 1 Miss. (1 Walker) 156 (1824).

34. *Id.* at 157–58. I omit his citations of *Strange* 478 and 875 and *Hawkins* 130 to document his account of the old law; these references are given by Blackstone, and will be taken up below. 2 *Strange* 875, as we will see, deals with a case of Chief Justice Raymond's, but not in the terms that Ellis speaks of.

35. 95 N.C. 588 (1886).

36. *Id.* at 588.



I encountered a statement by Lawrence Stone in his recent history of divorce in England. After noting that wives were more submissive in the past and that “the legal and practical authority of husbands to ill-treat, punish, or confine them was very much greater than is the case today,” he says: “As late as 1782, a judge declared that, if he had good cause, a husband might legally beat his wife with a stick no thicker than his thumb.”<sup>37</sup> He documents his paragraph by referring to Mildred Daley Pagelow’s *Family Violence*,<sup>38</sup> without noting which of its 600 pages are relevant, and by citing a plate from his 1977 book on family history. These references proved puzzling, for the plate shows only a picture of James Boswell,<sup>39</sup> and, though Pagelow does have a brief account of “Marriage and the Family in History” in which she draws extensively on Terry Davidson’s essay,<sup>40</sup> she does not repeat Davidson’s allegation of a nineteenth-century rule-of-thumb provision of the British common law, and there is nothing else of the sort in her book. However, a bit of probing revealed that Stone meant to refer not to plate 29 in his earlier book but to plate 19, which reproduces a caricature by James Gillray titled *Judge Thumb* (see next page). It shows a husband beating his wife, who cries, “Help! Murder for God sake, Murder!” The husband says: “Murder, hay? It’s Law you Bitch! it’s not bigger than my Thumb!” Meanwhile, a judge is in the foreground, holding two bundles of sticks—with each stick ending in a carved thumb—and hawking them: “Who wants a cure for a nasty Wife? Here’s your nice Family Amusement for Winter Evenings! Who buys here?” Stone has obviously concluded that the caricature was based on an actual court case in which the judge made a pronouncement of this kind, and that it was accepted as a serious precedent.

He is partly right: the judge in question was Sir Francis Buller, who had been appointed a puisne judge of the king’s bench in 1778 at the age of thirty-two; he is said to have been the youngest English judge ever created (he married young, too, at the age of seventeen). His biographer, William Prideaux Courtney, says of him:

Though his clearness of statement and his quickness in seizing the points of the contending counsel were universally recognised, his conduct on the judicial bench has often formed the subject of severe criticism. He was considered hasty and prejudiced, and his unfortunate assertion that a husband could thrash his wife with impunity provided that the stick was no bigger than his thumb, tempted Gillray into planting the belief more deeply in popular opinion by a caricature of Buller as Judge Thumb, which he published on 27 November 1782.<sup>41</sup>

Gillray titled the piece *Judge Thumb; or, Patent Sticks for Family Correction: Warranted Lawful!* He, or at least the husband of his cartoon, took the judge to mean that each husband’s thumb was to serve as the measure for his stick, but others seem to have taken the judge to be referring to his own thumb. We are

37. Road to Divorce: England, 1530–1987, at 201 (New York, 1990).

38. New York, 1984.

39. The Family, Sex and Marriage in England 1500–1800, plate 29 (New York, 1977).

40. Pagelow, *supra* note 38, at 277–84.

41. Buller, Sir Francis (1746–1800), in 3 The Dictionary of National Biography, eds. Leslie Stephen & Sidney Lee, 248, 249 (London, 1921–22).



**JUDGE THUMB.** *Copyrighted by W. Humphrey No. 227*  
*or—Patent Sticks for Family Correction: Warranted Lawful!* *Strane*

told, "A witty Countess is said to have sent the next day to require the measurement of his thumb, that she might know the precise extent of her husband's right."<sup>42</sup>

Courtney's concluding assumption, that Gillray's caricature had the effect of reinforcing Buller's thumb criterion as a legal rule in the popular mentality, is dubious. But Stone's assumption (or what I take to be his assumption) that such a criterion became an accepted precedent in the courts is even more dubious. Rather, it seems to have been effectively laughed out of court. There had in fact been two earlier cartoons published on the subject. The first appeared on February 1, 1782, in *The Rambler*, with the caption, *Mr. Justice Thumb in the Act of Flagellation*. It shows Buller with a stick raised over a woman, who cowers away from him. Buller says, "Tis no bigger than my Thumb," while she says, "Would I had known of this before Marriage!" A large bundle of sticks leans against the wall, and, on the floor, a partly unrolled document reads, "A Husband may Chastize his Wife with a Stick the Size of his thumb. Coke."<sup>43</sup> The dictum obviously came not from Coke but from the caricaturist's imagination. The second cartoon was published only six days before Gillray's, on November 21, 1782; it undoubtedly provided Gillray with his inspiration. It has the title, *Judge Thumb, or—Sticks of a Lawful Size for Family Discipline*. A wife has been seized by her husband, who raises a stick to beat her. She cries, "Oh Murder! Murder! Oh cruel Barbarian!" He answers, "Cruel, ha! tis according to Law, you Jazabel!" The judge, in the foreground, is walking forward with a large bundle of sticks on his shoulder, saying, "Here's amusement for married gentlemen or, a Specific for Scolding Wife; who buys of me."<sup>44</sup> It was a running joke but seems not to have lasted out the year.

### The Slippery Common Law: Blackstone and His Sources

Let us examine some pertinent English cases and commentaries to get an idea of the actual range of operative or influential opinions on the subject of domestic violence. We can begin with the paragraph that Blackstone devotes to the subject, which has been often cited above. He says:

The husband also (by the old law) might give his wife moderate correction [1 Hawk. P.C. 130]. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds [Moor. 874], and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet* [F. N. B. 80]. The civil law gave the husband the same,

42. Thomas Wright & R. H. Evans, *Historical and Descriptive Account of the Caricatures of James Gillray* 14 (London, 1851); see 1 *The Works of James Gillray* plate 13 (London, 1847). For a description of the caricature, see Mary Dorothy George, 5 *Catalogue of Political and Personal Satires Preserved in the Department of Prints and Drawings in the British Museum* 650 no. 6123 (London, 1935); but she misreads "nasty" as "rusty" and "God" as "God's."

43. George, *supra* note 42, at 650 no. 6124.

44. *Id.* at 649–50 no. 6122.

or a larger, authority over his wife: allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem*; for others, only *modicam castigationem adhibere* [Nov. 117 c. 14 & Van Leeuwen *in loc.*]. But, with us, in the politer reign of Charles the Second, this power of correction began to be doubted [1 Sid. 113; 3 Keb. 433]; and a wife may now have security of the peace against her husband [2 Lev. 128]; or, in return, a husband against his wife [Stra. 1207]. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour [Stra. 478, 875].<sup>45</sup>

Judge Peters in *Fulgham* is right to say that Blackstone cites no decided case to establish a general law of moderate castigation. This is true not only of later times (which is not surprising, since he says that the law of correction came to be doubted), but of earlier times as well. Blackstone first refers to William Hawkins, writing earlier in the eighteenth century, to corroborate his statement that according to the old law the husband could give his wife moderate correction; but Hawkins for his part simply notes that there was a difference of opinion on the point. In his discussion "Of Surety of the Peace," Hawkins says:

Also there are some actual assaults on the person of another, which do not amount to a forfeiture of such a recognizance [for good behavior]; as if an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; or if a parent in a reasonable manner chastise his child, or a master his servant, being actually in his service at the time; or a schoolmaster his scholar, or a gaoler his prisoner, or even a husband his wife, as some say; or if one confine a friend who is mad, and bind, and beat him, etc. in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands on another, and thereby stay him from inciting a dog against a third person; or if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my land, or goods . . . .<sup>46</sup>

We note that the law is secure in the other situations he mentions, but not on the question of whether a husband can chastise his wife in a reasonable manner. His citations at this point are: "Crom. 28b, 136b; F. N. B. 80 F; Hetley 149; *contra* 1 Syd. 113, 116." The first is to a 1606 revision of Richard Crompton's revision of Anthony Fitzherbert's treatise on the office of justice of the peace;<sup>47</sup>

45. 1 William Blackstone, *Commentaries on the Laws of England*, 8th ed., 444–45 (Oxford, 1778). (I use the eighth edition, the last produced during Blackstone's lifetime—he died in 1780—but I put his footnoted references in the text, in brackets.)

46. 1 William Hawkins, *A Treatise of the Pleas of the Crown*, 2d ed., 130 (London, 1724).

47. Revised Crompton: *L'office et auctorité de Justices de Peace*, in part collect per Sir Anthonie Fitzherbert, Chivalier, jades un de les Justices del Common Banke, et ore le cinque fois inlarge per Richard Crompton, un Apprentice de la Common Ley, et imprimee lan du Grace 1606 (London: 1617). This volume is quite different from Crompton's own work of the same title, first printed in London in 1583 by Richard Tottell; I have consulted the reprint of 1584. Crompton flourished from 1573 to 1599. See Charles William Sutton, *Crompton, Richard* (*Jl.* 1573–1599), in 5 *The Dictionary of National Biography*, *supra* note 41, at 148, 148. In my citations of law French and law Latin, I use my own punctuation and capitalization, but follow the spelling of the original, except for expanding abbreviations and restricting *i* and *u* to vowels and *j* and *v* to consonants, which became the custom of printers throughout Europe around the middle of the seventeenth century. In deciphering the texts, I have been guided by J. H. Baker, *Manual of Law French* (Amersham, England, 1979).

of the two pages cited, the first refers to an item in a list of cases of "Man-slaughter per infortunium, collect per Mast. Stamford":

Issint est ou home correct sa feme, son servant, ou enfant, ou son scholler raisonablement, sans intent de tuer, et il devie de ceo. *Bracton*, cap. 4, accord pur correcter de scholler, *Croke* 136.<sup>48</sup>

I translate:

Thus it is when a man corrects his wife, his servant, or child, or his pupil reasonably, without intending to kill her or him, and he or she dies of it. *Bracton*, chapter 4, supports the correction of students (*Croke* 136).

The second reference comes under the rubric, "Quel act serra dit infreinder de bone port ou peace, et que nemy" (What act shall be said to break good conduct or peace, and what not):

Home correct sa feme, servant, ou enfant raisonablement, nest infreind del peace, etc. (*Mar. L.* 7.21; *C.* 4.6.53).<sup>49</sup> (If a man corrects his wife, servant, or child reasonably, it is not a breaking of the peace.)

Hawkins's second citation is of Fitzherbert's collection of writs, *La Novelle Natura Brevium*, first published in London in 1534 and translated into English and expanded in 1652. Here it is stated that "if the husband threaten his wife to beat or to kill her, she shall have this writ," which begins, "Supplicavit nobis A, uxor B, quod cum ipsa de vita sua et mutilatione membrorum suorum per praedictum B graviter et manifeste comminata existat" (A, the wife of B, supplicated us that, since she is under grave and manifest threat of her life and the mutilation of her limbs because of the aforesaid B), and so on. Under terms of the writ, the husband is to be summoned and required to guarantee "quod ipse praefatam A bene et honeste tractabit et gubernabit; et dampnum et malum aliquod eidem de corpore suo, aliter quam ad virum suum ex causa regiminis et castigationis uxoris suae licite et rationabiliter pertinet, non faciet, nec fieri procurabit" (that he will not do, or cause to be done, any harm or evil to her body, other than licitly and reasonably pertains to a husband for ruling and chastising his wife).<sup>50</sup> This, we note, is the writ that Blackstone himself quotes to support his statement that the law prohibited a husband from using all but reasonable violence against his wife.

Hawkins's final citation in favor of a husband's ability to chastise his wife with impunity is the case of *Wife of Cloburn v. Her Husband* in the time of Charles I, around 1630, reported by Hetley,<sup>51</sup> which concerned the wife complaining against her husband in the Spiritual Court *causa saevitiae* (on a charge of cruelty), alleging that "he gave her a box on the ear, and spat in her face, and whirled her about and called her damned whore"; the Spiritual

48. Revised Crompton, fol. 28v.

49. *Id.* fol. 136v. I have not traced the references.

50. Anthony Fitzherbert, *The New Natura Brevium* 80 F (p. 179 of the London 1704 edition).

51. Hetley 149, 124 Eng. Rep. 414 (C.P. n.d.).

Court ordered alimony to be paid. A prohibition was sought in the Court of Common Pleas ("for a ground of a prohibition, it was said, that Cloborn chastised his wife for a reasonable cause, by the law of the land as he might"), which was denied. Judge Richardson stated:

You'll say, that an husband may give reasonable chastisement to his wife, and we have nothing to do with it: but only that the husband may be bound to his good behaviour by the common law. And the sentence *in causa saevitiae* is *a mensa et thoro*, and we cannot examine what is cruelty and what not. And certainly the matter alleged is cruelty; for spitting in the face is punishable by the Star-Chamber. But if Mr. Cloborn had pleaded a justification, and set forth a provocation to him by the wife, to give her reasonable castigation; then there would be some colour of a prohibition.<sup>52</sup>

He is making the point that only the Spiritual Court could grant an actual separation on grounds of cruelty.<sup>53</sup>

Against the husband's right to chastise his wife Hawkins cites a case, *Manby v. Scott*, from the early Restoration, 1659, reported by Siderfin.<sup>54</sup> The court says, among other things,

Car coment nostre ley fist feme subject a sa baron uncore le baron ne poit luy tuer, sed ceo serra murder, ne il ne poit luy batue, sed le feme poit prayer le peace (1 E. 4. 1.a), et per semble reason donque il ne poit luy starve.<sup>55</sup> (For although our law makes the wife subject to her husband, still the husband cannot kill her, for that would be murder, nor can he beat her, for the wife can seek the peace (1 Edward IV, 1a), and for a similar reason he cannot starve her.)

This is the statement that Blackstone refers to for his conclusion that it was only in the politer times of Charles II that the law of moderate correction began to be doubted. Hawkins cites as well a further comment of the court:

[S]i baron batue sa feme il poit lie luy a son bone port devant un justice de peace vel il poit sue luy in le Spiritual Court destre divorce causa sevitiae.<sup>56</sup> (If a husband beats his wife, she can bind him to his good conduct before a Justice of the Peace, or she can sue him in the Spiritual Court, to be divorced by reason of cruelty.)

52. *Id.* at 150, 124 Eng. Rep. at 414.

53. Divorce in the sense of dissolution of a valid marriage was not permitted; but, of course, annulments of invalid marriages could be had. When the term *divorce* is used, it means either annulment, as in the case of Henry VIII (see my *The Matrimonial Trials of Henry VIII* (Stanford, 1976)) or separation *a mensa et thoro* ("from board and bed"), as here. See Martin Ingram, *Church Courts, Sex and Marriage in England, 1570-1640*, at 146 (Cambridge, England, 1987). The first divorce *a vinculo* (from the bond of marriage) by act of Parliament was granted in 1700, to the Duke of Norfolk. 13 Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present, ed. T. B. Howell, 1283-1370 (London, 1812); see Stone, *supra* note 37, at 315-16.

54. 1 Siderfin 109, 82 Eng. Rep. 1000 (Ex. 1659).

55. *Id.* at 113, 82 Eng. Rep. at 1003. I have not traced any statute of Edward IV's touching on this point.

56. *Id.* at 116, 82 Eng. Rep. at 1005.

For his statement that the power of correction was confined within reasonable bounds, Blackstone cites *Sir Thomas Seymor's Case*, reported by Moore, from the time of James I, around 1615,<sup>57</sup> which reads in its entirety:

La feme de Sir Tho. Seymor libel vers son baron pur alimony quia son baron luy batus issint que el ne puissoit cohabitre ove luy. Et le Court deny un prohibition; mes s'el ust cohabit ove son baron el ne puissoit aver sue pur alimony. Auxi un feme poit aver le peace vers son baron pur unreasonable correccion.<sup>58</sup> (The wife of Sir Thomas Seymor presents a libel against her husband for alimony because her husband beat her so much that she could not live with him. And the court denies a prohibition; but if she were to live with her husband she would not have been able to sue for alimony. Also, a wife can have the peace against her husband for unreasonable correction.)

The other case that he cites from the more liberal times of Charles II is *Lord Leigh's Case*, 1674, reported by Keble,<sup>59</sup> which reads as follows:

On difference between him and his lady about settlement of 200*£. per annum*, pin-mony in case of separation, she upon affidavit of hard usage, and that she went in fear of her life, prayed security of the peace against him, which was granted. And by Hale, Chief Justice, the *salva moderata castigatione* in the Register is not meant of beating, but only of admonition and confinement to the house, in case of her extravagance; which the Court agreed, she being not as an apprentice, etc. but after, the parties were reconciled, and all discharged.<sup>60</sup>

To document that wives may swear the peace against their husbands, Blackstone cites *The King v. Lord Lee*, ca. 1675<sup>61</sup> (Lord Lee may be the same as the Lord Leigh just dealt with):

*Habeas corpus* was granted to him the last term, to bring the body of his wife into Court, upon affidavits of ill usage, imprisonment, and danger of her life, as was done before in the case of Sir Philip Howard; the Lord Lee brought his wife into Court, where the one charged the other with unkindnesses, and she made oath in Court, that she went in danger of her life by him; and notwithstanding divers affidavits were made in Court to the contrary, of his good usage, the Court offered to bind him with sureties, according to F. N. B. 80 & 239 B. But they declared they could do no more than bind him, and that they could not remove her from him.<sup>62</sup>

To substantiate his statement that husbands may take similar action against their wives, Blackstone cites *Sims's Case* from 17 George II (1743-44),<sup>63</sup> which reads: "He exhibited articles of the peace against his wife, and the Court received the same without any objection."<sup>64</sup> To show that the courts still permit a husband to keep his wife captive, he cites *Rex v. Lister* (1721).<sup>65</sup>

57. Moore 874, 72 Eng. Rep. 966 (K.B. n.d.).

58. *Id.* at 874, 72 Eng. Rep. at 966.

59. 3 Keble 433, 84 Eng. Rep. 807 (K.B. 1674).

60. *Id.* at 433, 84 Eng. Rep. at 807.

61. 2 Levinz 128, 83 Eng. Rep. 482 (K.B. n.d.).

62. *Id.* at 128, 83 Eng. Rep. at 482.

63. 2 Strange 1207, 93 Eng. Rep. 1131 (K.B. n.d.).

64. *Id.* at 1207, 93 Eng. Rep. at 1131.

65. 1 Strange 478, 93 Eng. Rep. 645 (K.B. 1721).

Where the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company; it is lawful for the husband, in order to preserve his honour and estate, to lay such a wife under a restraint. But where nothing of that appears, he cannot justify the depriving her of her liberty.<sup>66</sup>

But the other case he cites, *Child v. Hardyman*, 4 George II (1730-31),<sup>67</sup> is quite different:

Chief Justice Raymond . . . held, if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner; the tradesman trusts her at his peril, and the husband is not bound. And this had been so adjudged in two or three cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he does not absolutely refuse to receive her again: but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage. And the plaintiff was nonsuit.<sup>68</sup>

Presumably she was to be kept in a garret only as long as she wished to stay with her husband; that is, she was not being held a prisoner.

### Roman Civil Law and Canon Law

Blackstone's assertion that the Roman civil law gave a power of correction to the husband similar to or greater than the pre-Restoration common law needs to be qualified. When he claims to be citing both Justinian's novels and Simon van Leeuwen's commentary, he is actually drawing only on the latter, and in a distorted way.

The cited novel exists in its Greek original and an official Latin translation; it was known as *Si quis autem*, from its first words. I give the text here:

Si quis autem propriam uxorem flagellis aut fustibus ceciderit sine aliqua causarum quas contra uxores ad matrimonii solutionem sufficere jussimus, matrimonii quidem solutionem ex hoc fieri nolumus; virum autem qui monstratur sine hujusmodi causa vel flagellis vel fustibus cecidisse suam uxorem, tantum pro hujusmodi iniuria ex alia sua dare substantia uxori, etiam constante matrimonio, quantum tertia pars antenuptialis facit largitatis.<sup>69</sup>

That is,

If anyone should strike his own wife with whips or rods without any of the reasons we have listed against wives as justifying divorce, we do not wish this itself to be a reason for the marriage to be dissolved. But we wish the man who is demonstrated to have struck his wife with whips or rods without any such reason to give to his wife, in compensation for such injury, from his own substance, an amount equal to a third of the pre-nuptial dowry, even though the marriage remains intact.

66. *Id.* at 478, 93 Eng. Rep. at 646.

67. 2 Strange 875, 93 Eng. Rep. 909 (K.B. n.d.).

68. *Id.* at 875, 93 Eng. Rep. at 910.

69. Nov. 117.14, 3 Corpus iuris civilis, eds. Rudolf Schoell & Wilhelm Kroll, 564 (Berlin, 1895).



According to van Leeuwen, this means:

In quibus causis vir potest uxorem repudiare, in illis omnibus potest uxorem acriter verberare et domo exigere.<sup>70</sup> (In all the cases in which a husband can repudiate his wife, he can beat her sharply and drive her away from home.)

In other words, the husband's action is taken to be a kind of do-it-yourself divorce, which will be confirmed in court if he can prove a sufficient grievance. Otherwise, he is to be assessed a large fine, to be paid to the wife, and the marriage is to be left intact (unless, presumably, the wife herself wishes a divorce).

Van Leeuwen goes on to say:

In aliis casibus, volunt interpretes marito modicam uxoris castigationem permitti, arg. l. [=lex] 17 § 1, ff. De usufr.; l. 5 in fine, l. 6, ff., Ad leg. Aquil.; l. 13 § 4, ff. Locati; l. 2 in fine, De obsequiis; l. 1, Cod., De emendat. propinq. Si tamen id acciderit, volunt eo casu jurari vel cautionem a marito praestari, nunquam uxorem in posterum sic verberatum iri. (In other cases, interpreters desire the husband to be permitted moderate chastisement of his wife, arguing from Digest 7.1.17 § 1 [lord's right of full coercion over slave]; Digest 9.2.5–6 [teacher's right to use light chastisement but not cruelty]; Digest 19.2.13 § 4 [rights of employer over employee]; Digest 37.15.2 § 1 [rights of parents and patrons]; Code 9.15.1 [rights of related seniors to correct minors]. But if it should happen [that he beat her without any such cause], the interpreters desire him to be sworn or to give surety not to do so again.)

We see, then, that the civil law itself says nothing about allowing severe beatings of wives for some misdemeanors, as Blackstone alleges, but instead stipulates that if a man should attack his wife in this way without having sufficient grounds against her for a divorce, he is to be punished. And the notion that husbands could exercise moderate chastisement was only a conclusion of the late commentators, drawn from analogy to other situations in which correction was permitted. It was not to be found in the Ordinary Gloss of Accursius (*ca.* 1230), which was the primary guide for the Middle Ages and succeeding centuries.<sup>71</sup>

*Si quis autem* was cited by medieval authorities on canon law to prove the opposite of what Blackstone cites it for, namely, to indicate that husbands did not have the right to beat their wives. But the canonists did develop the doctrine of moderate chastisement, as can be seen in the Ordinary Gloss to Gratian's *Decretum*. Gratian finished the *Decretum*, or, as he called it, *Concordantia canonum discordantium* (Concordance of Discordant Canons), around 1140, and, with some early additions (notably excerpts from Roman civil law), it was accepted as the first volume of canon law, though it was not officially established as such until the Roman edition of the *Corpus juris canonici* was issued in 1582. The Ordinary Gloss of John Teutonicus (the German), compiled around

70. 2 *Corpus iuris civilis*, ed. Simon van Leeuwen, 159 (3d pagination) (Amsterdam, 1663); in the 1740 edition, which lacks the Greek text, 2:605.

71. 5 *Corpus juris civilis cum glossa ordinaria*, ed. Johannes Fehius of Gailsdorf, 510–11 (Lyons, 1627, reprint 1965–66).

1215, largely from the slightly earlier commentary of Laurence Hispanus (of Spain), was revised later by Bartholomew Brixiensis (of Brescia) in light of the *Decretals of Gregory IX* (1234), the second volume of canon law.

Gratian includes the canon *Placuit*, which he attributes to the first Council of Toledo, with other authorities forbidding the death penalty for adulterous wives. According to the canon, if the wife of a cleric sins, her husband can prevent her from having the opportunity of sinning further by guarding her, but without inflicting death on her, and of confining her to home and compelling her to salutary fasts, but not starving her.<sup>72</sup> The later *Casus*, or summary of the chapter, which the Roman edition puts before the Ordinary Gloss, alleges that clerics may weaken their wives with blows and hunger (“macerando eas verberibus et fame”),<sup>73</sup> but Laurence Hispanus, followed verbatim by Teutonicus and Brixiensis, is careful not to distort the meaning of the canon in this way. When the canon stipulates that the husband is not to kill the wife, Laurence says: “For even if he beat her badly, except for the reasons expressed in the law, he would be punished with a monetary fine,” referring to the novel cited by Blackstone, *Si quis autem*, and also citing Code 5.17.11 (stipulating fines for repudiating a wife without cause). He continues: “But does not a layman have the same power over his wife? I say no, since I do not find it expressed. He can chastise her, however, as I noted above,” referring to his commentary on the canon *Sicut alterius*.<sup>74</sup>

*Sicut alterius* makes a comparison between the bishop’s powers over his church and a husband’s powers over his wife. To the statement that the wife can be judged by her husband Laurence comments: “That is, corrected and beaten for minor misdeeds. For if she committed serious offenses she would be judged by a judge. This applies when she is to be ruled by her husband for the forming of morals outside of a court setting, for she is a member of his ‘family,’” referring to the canons *Haec imago* and *Duo ista*. “But he is not to strike her with rods,” citing the novel *Si quis autem*, “or by blows, since blows are alien to free-born persons,” citing Code 5.17.8. “Similarly, hirelings can be chastised and beaten . . . and so can a monk by his abbot; but when correction is by the bishop it is in a formal court.”<sup>75</sup>

72. Gratian, *Decretum* 2.33.2.10, Friedberg, 1 *Corpus iuris canonici*, 1154–55 (Leipzig, 1879): “Placuit, ut, si quorumcumque clericorum uxores peccaverint, ne forte licentiam peccandi plus habeant, accipiant mariti earum hanc potestatem, preter necem custodiendi, ligandi in domo sua, ad jejunia salutaria, non mortifera eas cogentes.”

73. *Casus* to Gratian 2.33.2.10, 1 *Corpus juris canonici*, 1656 (Rome, 1582; reprint Lyons, 1606).

74. Ordinary Gloss to *id.*: “Nam si eam etiam male verberaverit, nisi pro causis in lege expressis, punitur in pecunia. . . . Sed nunquid laicus idem potest de uxore sua? Dico quod non, quia non invenio expressum. Castigare tamen potest eam, ut notavi supra.” For Laurence Hispanus, I use the *Glossa palatina*, Vatican MS Pal. lat. 658; see fol. 84v; the same text is in Vat. MS Reg. lat. 977, fol. 242v; for John Teutonicus, see Vat. MS lat. 1376, fol. 252v.

75. Laurence Hispanus, *Glossa palatina* to Gratian 2.7.1.39 (Pal., fol. 42, Reg., fol. 120): *iudicari*, i.e. corrigi et verberari pro levibus commissis, nam si enormia committeret a iudice iudicaretur et punitur, sed quando ad morum informationem extra figuram iudicii a viro regenda est, cum ei sit famula, 33 [q. 5 *Hec imago*; 23] q. 4 *Duo*. Non autem cedat eam fustibus [Nov. 117.14] . . . nec verberibus, que aliena sunt ab ingenuis [Code 5.17.8]. . . . Similiter mercenarii castigari possunt et verberari . . . et monachus ab abbate; sed in forma iudicii ab episcopo.

Laurence is modifying the opinion of his predecessor, Huguccio of Pisa, who finished his *Summa* on Gratian over a generation earlier, around 1190. Huguccio glossed the words “judged or disposed” in the canon thus:

That is, beaten, corrected, chastised. But should she not be judged by a judge? I respond and say the same about a wife as about a monk. If it comes to the formalities of law, then the wife is not to be judged by her husband, because he is not her ordinary judge. If however she is to be judged, but in matters of behavior, because she does not cook and prepare food well, or she does not tend to her husband’s goods properly, or she is very troublesome to him, or does not clean her [his?] nose well, and minimal things of this sort, and even in great and enormous matters, if it does not come to the formalities of law, she can certainly be judged and corrected and beaten by her husband, for a husband has power of making disposition of his wife and her doings and her possessions, as can be argued by the canon *Quod Deo* (C. 33 q. 5. [c. 5]); he can also force her to do penance, as in the canon *Placuit* (C. 33 q. 2). Moreover, she is judged by the law to be almost the husband’s servant, as in the canon *Haec imago* (C. 33 q. 5). Another objection: does not her father have power over her? Therefore, in some things she cannot be corrected and chastised by her husband. Therefore, I say, so that every objection may be removed, “judged or disposed” refers to those things in which the husband can and should judge her, namely in minor and lighter matters, and even in great matters, if they are not brought to the formalities of the law by someone other than her husband.<sup>76</sup>

Teutonicus, agreeing with Laurence against Huguccio, but doubtless seeing the contradiction in Laurence’s gloss in both allowing and forbidding beating, says instead (and he is followed by Brixienensis): “A husband can judge his wife by correcting her,” referring to *Duo ista*, “but not by beating her,” citing Code 5.17.8, “because beatings are alien to free-born persons, as it is stated there in the law. But he can chastise her temperately, because she is part of his family,” citing *Haec imago*, “as with a lord and his slave.”<sup>77</sup>

76. Huguccio Pisanus, *Summa super Decreto* 2.7.1.39, Vat. MS lat. 2280, fol. 153v (cf. Admont, MS Admontense 7):

*judicari aut disponi*, i.e., verberari, corrigi, castigari. Sed nunquid non debet judicari a iudice? Respondeo et dico de uxore quod de monacho. Si venitur ad solemnitatem juris, tunc uxor non a viro, quia non est iudex ordinarius ejus. Si tamen a iudice est judicanda, sed in moribus, quia non bene coqui[t] et parat cibos, non bene custodit res viri, multum est molesta ei, non bene purgat sibi nasum, et [in] hujusmodi minimis, et etiam in magnis [et] enormibus, si non venitur ad solemnitatem juris, bene potest judicari et corrigi et verberari a viro, qui[a] vir potestatem habet disponendi de uxori et factis et rebus ejus, ar. 33 q. 5, *Quod Deo*; ad penitentiam etiam potest cogere eam, ut 33 q. 2, *Placuit*. Pene etiam famula viri a lege judicatur, ut 33 q. 5, *Hec imago*. Item, nonne pater habet eam in potestate? Non ergo in quibusdam potest a viro corrigi et castigari. Sic ut ergo omnis objectio removeatur, dico *judicari aut disponi* in his in quibus vir potest et debet eam judicare, scilicet in minoribus et levioribus et etiam in magnis si non venitur ad solemnitatem juris ab aliquo quam marito.

77. Ordinary Gloss to Gratian 2.7.1.39, 836: “Judicare potest maritus uxorem corrigendo eam, 23 q. 4, *Duo ista*, sed non verberando eam, ut Cod. *De repu.*, *Consensu*, quia est de familia sua, 33. q. 5, *Haec imago*, sicut dominus servum” (Teutonicus, fol. 115). Guy of Baysio (“The Archdeacon”) in his *Rosarium* (A.D. 1300) explains the “non verberando” of the gloss by saying, “unless it is done for a serious reason,” citing Cardinal Hostiensis (A.D. 1271), “and unless the blows are light” (“nisi ex magna causa fiat . . . et nisi levia sint verbera”); I use the edition of Strassburg ca. 1473, *ad loc.*

*Duo ista* (Gratian 2.23.4.35) is an excerpt from St. Augustine, saying that rulers of various kinds should give appropriate correction to their subjects, not only the bishop to his people, but also the poor man to his household, the rich man to his "family," the husband to his wife, the father to his offspring, the judge to his province, the king to his nation. *Haec Imago* (Gratian 2.33.5.13) is one of the canons adduced to confirm that the wife is subject to the husband in all things but sexual relations (in which she has equal rights and obligations). Code 5.17.8 specifies that "if the wife proves that her husband has afflicted her with blows, which are alien to free-born persons, then we permit her freedom to use the necessary procedures of repudiation and to establish the justifications for divorce according to the laws."<sup>78</sup>

The result of the Ordinary Gloss pronouncements is that moderate chastisement is allowed, but it cannot include beating, confinement, or restriction of food. One can agree, then, that it is very misleading to accept a blanket statement like that of Roderick Phillips: "The right of a husband to beat his wife was recognized by canon law and by the ancient customary laws in medieval Europe."<sup>79</sup> Phillips proves the part about customary laws by citing some instances, but the assertion about canon law is backed up only by a reference to an article by E. William Monter, who simply says, "Canon law permitted wife beating," with no documentation.<sup>80</sup>

### Conclusion

In 1609, William Heale published a small book in opposition to William Gager, a well-known Latin dramatist who also happened to have a doctorate in civil law from Oxford. In the previous year Gager had publicly defended at Oxford the legality of wife-beating. Heale counters him on various levels, and when it comes to traditional Latin law, he says:

[I]n the whole body of either Law, Canon or Civil, I have not yet found (neither, as I think, hath any man else) set down in these or equivalent terms, or otherwise passed by any positive sentence or verdict, *That it is lawful for a husband to beat his wife*. But whatsoever is cited thence are either far-fetched conclusions, or unfriendly sequels, which hang as well together, being touched in judicious trial, as the joints of a rotten carcass engibbeted, being tossed with a violent wind.<sup>81</sup>

78. Code 5.17.8, 4 Corpus juris civilis 1243 (1627): "Si se verberibus, quae ingenuis aliena sunt, afficientem probaverit, tunc repudii auxilio uti necessario ei permittimus libertatem et causas dissidii legibus comprobare." It is in the context of this law that the editor of the Lyons 1627 edition, Johannes Fehius, says, "It is allowed the husband to correct his delinquent wife lightly, but not to throw her into prison or chains" ("Licet marito uxorem delinquentem leviter corrigere, at non in carcerem aut vincula conjicere"). In contrast, as we have seen, van Leeuwen takes up the doctrine of moderate chastisement of wives in his commentary on the novel *Si quis autem*.

79. Phillips, *supra* note 10, at 326.

80. The Pedestal and the Stake: Courtly Love and Witchcraft, in *Becoming Visible: Women in European History*, eds. Renate Bridenthal & Claudia Koonz, 119, 124 (Boston, 1977).

81. An Apologie for Women 28 (spelling modernized) (Oxford, 1609; reprint Amsterdam, 1974). For both Heale and Gager, see the entries in the Dictionary of National Biography.

So far as I can see, Heale is absolutely right in his assessment. As for the interpreters of the laws, he finds some who allow wife-beating and others who deny its lawfulness. Among the former, he cites the Ordinary Gloss to civil law,<sup>82</sup> but not the Ordinary Gloss to canon law, which, as we have seen, denies the husband the right to use violence on his wife.

In contrast to the canon law gloss, it is fairly certain that the interpreters summed up by van Leeuwen do permit wives to be beaten moderately, because they derive this right of the husband from parallel situations, like that of schoolmaster and student, where the person in authority does have a right to use such physical violence. Blackstone himself would perhaps agree with Chief Justice Hale in *Lord Leigh's Case* that the husband still had the right of confining his unruly wife to quarters—that is, some reasonable form of house arrest.

The doctrine that moderate chastisement means moderate beating can be found explicitly in Matthew Bacon's *New Abridgment of the Law*, first published in 1736 and reprinted many times, including in American editions. Bacon is definite about the law:

The Husband hath by Law Power and Dominion over his Wife, and may keep her by Force within the Bounds of Duty, and may beat her, but not in a violent or cruel Manner; for in such Case, or if he but threaten to beat her outrag[e]ously, or use her barbarously, she may bind him to the Peace, by suing out a Writ of *Supplicavit* out of Chancery, or may apply to the Spiritual Court for a Divorce *propter saevitiam*.<sup>83</sup>

The references he gives for this apodictic statement of the husband's right to beat his wife are none other than those given a few years earlier by Hawkins for a husband's right of reasonable chastisement of his wife: Crompton, Fitzherbert, and the Hetley case, countered by the Siderfin case. Bacon takes no notice of the Siderfin case in his overall assessment of the law on this point, even though he cites it, whereas for Hawkins, as we have seen, it was enough to make him declare the husband's supposed right to be only an opinion held by some authorities.

In the fourth edition of Bacon (1778), the editor adds what he takes to be Blackstone's doctrine: "The Husband may give his Wife moderate Correction. But this Power is confined within reasonable Bounds: He is prohibited from using any Violence."<sup>84</sup> In other words, he is *not* allowed to beat his wife. This addendum is omitted in other editions, for instance in the seventh (1832), annotated by Charles Edward Dodd.<sup>85</sup> In the Philadelphia edition of 1868, which would have been available to most of the judges mentioned in this

82. *Id.*, citing the gloss on Digest 9.2.5, 1 Corpus juris civilis 1019 (1627), which justifies the right of the husband to use light chastisement (*levis castigatio*) by referring to Digest 24.3.24 § 5, 2 Corpus 36, where, however, it turns out that the glossator is speaking of chastising not the wife but rather the servants who came with the wife's dowry.

83. 1 A New Abridgment of the Law, 4th ed., 285 (London, 1778) (citations omitted).

84. *Id.* (citation omitted).

85. 1 Matthew Bacon, A New Abridgment of the Law, 7th ed., 693 (London, 1832).

article, John Bouvier, the American editor, notes: "It may be doubted whether this rule of the English common law, that the husband has a right to beat his wife, is law in the United States. In Pennsylvania it is the constant practice to punish the husband for assaults and batteries upon his wife."<sup>86</sup>

As we can see, it can also be doubted that the notion that "the husband has a right to beat his wife" has a right to be called a "rule of the English common law." The common law is a very unstable creation, and alleged provisions of it often amount to no more than rash judgments of commentators based on shaky precedents. Similar rash judgments, of course, can be found outside the legal field. Let us look at how Lawrence Stone analyzes the subject of wife-beating in the Elizabethan *Homily of the State of Matrimony*, that is, Homily 18 from *The Second Tome of Homilies* (1563). He says:

It left the audience in no doubt about the inferior status, rights and character of a wife: 'the woman is a weak creature not endued with like strength and constancy of mind; therefore, they be the sooner disquieted, and they be the more prone to all weak affections and dispositions of mind, more than men be; and lighter they be, and more vain in their fantasies and opinions.' For the sake of domestic peace, however, the husband is advised not to beat his wife, as is his right, but to take account of the psychological fact that a woman is 'the weaker vessell, of a frail heart, inconstant, and with a word soon stirred to wrath.'<sup>87</sup>

The portions that Stone quotes directly are, lamentably, to be found in the homily, but his paraphrase of the rest of the sermon, according to which the homilist supposedly acknowledges the husband's right to beat his wife while urging him not to use it, is a clear distortion of the text, for the homilist denies the husband any such right. Here is what he says, first in his address to wives:

For if we be bound to hold out our left cheek to strangers, which will smite us on the right cheek; how much more ought we to suffer an extreme and unkind husband! But yet I mean not that a man should beat his wife; God forbid that; for that is the greatest shame that can be, not so much to her that is beaten, as to him that doth the deed.

Here is what he says when he addresses husbands:

[L]et there be none so grievous fault to compel you to beat your wives. But what say I? your wives! No, it is not to be borne with, that an honest man should lay hands on his maid-servant to beat her. Wherefore, if it be a great shame for a man to beat his bond-servant, much more rebuke it is to lay violent hands upon his free-woman. And this thing may be well understood by the laws which the honest Paynims have made, which doth discharge her any longer to dwell with such an husband, as unworthy to have any further company with her, that doth smite her. For it is an extreme point, thus so vilely to entreat her like a slave, that is fellow to thee of thy life, and so joined unto thee beforetime in the necessary matters of thy living. And therefore a

86. 2 Matthew Bacon, *A New Abridgment of the Law*, ed. John Bouvier, 14 (Philadelphia, 1868).

87. Stone, *supra* note 39, at 198.

man may well liken such a man (if he may be called a man, rather than a wild beast) to a killer of his father or his mother.<sup>88</sup>

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I hope that my unpacking of laws and commentaries on the subject of wife-beating proves as instructional for my readers as it has proved for me. I intend to expand my study of medieval doctrines on domestic discipline and eventually bring it to bear on my main literary interest, Chaucer, especially in his portrayal of the Wife of Bath, whose husbands had been concerned to control her movements outside the house. This is especially true of her fifth husband (the only one she really loved), who used to beat her. In a final fight, he fears he has killed her, and he promises never to strike her again. After she strikes a retaliatory blow, they reconcile for good and live happily ever after.

Blackstone's paragraph on the rights of husbands over wives is particularly important, and it has been variously interpreted by subsequent generations. As we have seen, Blackstone is saying, basing his views on a remarkably slender listing of precedents, that before the time of Charles II the common law judges accorded husbands the right of using reasonable violence in governing

88. Certain Sermons or Homilies Appointed to be Read in Churches in the Time of the Late Queen Elizabeth 454-55 (Philadelphia, 1844) (citations omitted).

I would like to mention here a treatise brought to my attention by Linda Hirshman: *The Lawes Resolutions of Womens Rights*, published at London in 1632 by the "assigns" of John More (reprint Amsterdam 1979). (In what follows, I will modernize spelling, punctuation, and capitalization.) Its running title is *The Woman's Lawyer*, and this was doubtless the title given it by its original author, sometimes identified as Sir John Doddridge (see the entries in Library of Congress, 319 National Union Catalogue 342, col. 3), justice of the King's Bench, who died in 1628, author of *The English Lawyer*, issued posthumously in 1631 by the same publisher. The manuscript was discovered by a student, "T. E." (possibly Thomas Edgar), without knowledge of the author's identity, as he tells us in an epistle to the reader. After editing and supplementing it, T. E. published it under the above title, which he says is both the theme and the subject of the work: "the law's resolutions of women's rights." T. E.'s epistle is preceded by a preface by "I. L." (that is, probably, "J. L."); no suggestions as to his identity have been forthcoming. The author gives his motive for writing in the first section: namely, to be of service to women in explaining "that part of the English law which containeth the immunities, advantages, interest, and duties of women." *The Woman's Lawyer* at 3. Usually his tone is straightforward in setting forth the laws governing the estate of women, the effects of marriage, and so on, but sometimes he becomes ironic or sarcastic, especially in his impatience with the disadvantages that the law has placed upon women. The subject of wife-beating is woven into his discussion of the effects of marriage on the woman. He says that it follows from what has been said about the wife's loss of status that she has no right to bring an action at law, and therefore her husband can beat her without fear of punishment, as Sir Robert Brooke points out, citing a case from the twelfth year of the reign of Henry VIII. (I have not been able to find this passage in the edition of Brooke's *La Graunde Abridgement* published by Richard Tottell, London, 1576.) He goes on to say that there seems to be a positive statement in the law of the husband's right to castigate his wife, citing the writ reported by Fitzherbert (he voices his contempt for the idea of moderate correction by a parenthetical exclamation, "mark you, I pray!"). Returning to Brooke's finding, he says that if the husband can lawfully beat his wife only because she cannot sue him, then it should be lawful for her to beat him in return, because no practical legal course of action is open to him. At the end of his discussion of the husband's rights over what used to be the woman's rights, he ends section 10 by saying that he included the learning on battery in his treatment "because in my poor opinion it were better to combat for household mastery in the beginning, than to bring a writ of right for it when it hath gone too long, by title of rusty prescription." *The Woman's Lawyer* at 131 [bis].

their wives, but that later on, even though the lower classes still insisted on the right, it was not recognized by the courts, though the courts did allow restraints upon wives' movements in cases of gross misconduct. One of the American judges cited above, Ellis in *Bradley*, wrongly assumed that Blackstone was upholding the privilege claimed by the lower classes as still supported by the common law; and a similar misapprehension seems to lie behind the words of Judge Peters in *Fulgham*.

In more recent times, Blackstone has been more mistreated. A common mistake has been to cite his account of the older law allowing wife-beating as still current in his own day, and as justified by him. Thus Davidson says, "Blackstone saw nothing unreasonable about the wifebeating law. In fact, he believed it to be quite moderate. . . . With Blackstone as a guide, America's first states formed their wifebeating laws."<sup>89</sup> The same is true of Linda Hirshman in her attempt to refute Christina Hoff Sommers's exposé of the wife-beating "rule of thumb" as a feminist fiction. Hirshman takes the Latin of the writ cited by Fitzherbert as giving Blackstone's own view of the current common law, that husbands could reasonably beat their wives.<sup>90</sup> Sommers rightly responds that Blackstone was speaking of the old law, which had been superseded in his time, but she is not justified in holding that her excerpting of Blackstone included the element of violence in the old law.<sup>91</sup> Hirshman is right in saying that Sommers distorts Blackstone's account of the old law by quoting him thus: "But this power of correction was confined within reasonable bounds and the husband was prohibited from using any violence to his wife . . . ."<sup>92</sup> That is, by omitting the Latin of the writ, she omits Blackstone's qualification, namely that the law did allow reasonable violence. She seems to make Blackstone say that the old law allowed husbands a power of correction that stopped short of violence, and that even this limited power came to be doubted in later times by the courts, which however still allowed it to the lower rank of people by letting them restrain their wives. Her general conclusion is therefore off base: "Blackstone plainly says that common law prohibited violence against wives, although the prohibitions went largely unenforced, especially where the 'lower rank of people' were concerned."<sup>93</sup> In fact,

89. Davidson, *supra* note 7, at 79. Her allegation that American laws authorized wife-beating is not supported by any documentation and seems to be unfounded; see Sommers, *supra* note 6, at 205-06 (citing Elizabeth Pleck, *Wife Beating in Nineteenth-Century America*, 4 *Victimology* 71 (1979)). But I should note, apropos of her claim that the British common law adopted a thumb criterion in the nineteenth century, that Elizabeth Cady Stanton made a similar claim about the current common law in her 1854 address to the New York legislature. She says, "By the common law of England, the spirit of which has been but too faithfully incorporated into our statute law, a husband has a right to whip his wife with a rod not larger than his thumb, to shut her up in a room, and administer whatever moderate chastisement he may deem necessary to insure obedience to his wishes, and for her healthful moral development!" *Quoted in* John K. Wilson, *Stolen Feminism? Democratic Culture*, Fall 1994, at 6, 8; see 1 Stanton et al., *History of Woman Suffrage* 595, 599 (New York, 1881).

90. Scholars in the Service of Politics, *L.A. Times*, July 31, 1994, at M5.

91. See Hirshman's Statistics (letter to the editor), *L.A. Times*, Aug. 13, 1994, at B7.

92. Sommers, *supra* note 6, at 205.

93. *Id.* Professor Sommers informs me that she is correcting her account of Blackstone in the next printing of her book.



Blackstone limits his observation about the lower rank of people to their insisting on the old law of wife-beating, which was no longer recognized by the courts. He does not limit the courts' allowance of restraints upon wives to any particular class of people, and he says nothing about any failure of the courts to enforce their new interpretation of the law.

In most of the texts we have reviewed, at least from Blackstone through the American judges of the last century to the modern writers on wife-beating, we see a tendency to believe that customs were worse in earlier eras and other lands than in the writer's own more enlightened time and place—at least in theory, if not in practice. No one likes to be associated with any approval of wife abuse. But we must all guard against unfairly accusing others of harboring beliefs or engaging in practices for which there is no evidence, and we should be concerned to give due credit to those who in the past tried to mitigate the harsh customs and practices of others.

*Rule of thumb* has received a bad rap. I call on all my readers to admit its innocence, especially those who have been guilty of defaming it in the past, and I urge everyone to go out and buy a few good dictionaries and put them to constant use. I recommend the Merriam-Webster *New Collegiate Dictionary*, which in the ninth and tenth editions gives dates for earliest uses of words. The same is true of the Random House dictionaries, both the unabridged and the smaller version, *Webster's College Dictionary*. The *American Heritage Dictionary* has a wonderful etymological appendix both in the large version and, most recently, in the smaller college version as well. *Webster's New World Dictionary* is also very good, and it has the added feature of etymologizing American place names (for example, *Ozark* comes from *aux Arcs*, that is, "to the region of the Arkansa Indians"). The *OED*, at least in its compact or quasi-microscopic form (to be distinguished from the two-volume *Shorter Oxford*, which, though good, does not have the exact dates and full texts of the original), should be on the top of the list, for those who can afford it. Law libraries should keep the full-sized second edition handy for all users. I was disappointed, when researching this article, to find that the UCLA Law Library, which used to keep the volumes of the *OED* on the shelf closest to the entrance of the reading room, has now replaced it with the *Encyclopedia Britannica* and relegated the *OED* to the third floor. I hope that the responsible powers will repent of this move and bring it back where it belongs.